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IN THE

Supreme Court of the United States

[redacted]

WILLIAM B. WETMORE,

Plaintiff-in-Error,

vs.

ANNETTE B. MARKOE (formerly Annette B. W. Wetmore),

Defendant-in-Error.

SUPPLEMENTAL REPLY BRIEF

OF PLAINTIFF-IN-ERROR.

Submitted by Permission of the Court.

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United States Supreme Court.

WILLIAM B. WETMORE,
Plaintiff-in-Error,

against

ANNETTE B. MARKOE (formerly Annette B. Wetmore,
Defendant-in-Error.

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-IN-ERROR, SUBMITTED BY PERMISSION OF THE COURT.

FIRST POINT.

The application of Section 1268 of the Code of Civil Procedure is not confined to judgments which have been docketed, and if it were, there was a judgment docketed in this case.

The section, which will be found quoted at length on the reply brief of plaintiff-in-error (pp. 1-3),

provides that "an order must be made directing said judgment to be cancelled and discharged of record, and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is cancelled and discharged by order of the court, giving the date of entry of the order of discharge."

A judgment may be of record though not docketed, and therefore one might well be entitled to an order directing a judgment to be discharged of record, though he could not have the same marked on the docket as cancelled or discharged. The Code of Civil Procedure, Section 1236, provides that

> "Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, and such filing shall constitute the entry of the judgment. The clerk shall, in addition to the docket books required to be kept by law, keep a book, styled the judgment book, in which he shall record all judgments entered in his office."

Judgments filed are usually also docketed, and the Legislature in the enactment of Section 1268 intended to supplement the order of the court by the action of the clerk, but the fact that the directions given to the clerk by the section will not in a given case, namely, where the judgment has not been docketed, adequately provide for cancellation, is no reason for saying that the authority is not vested in the court.

It is urged by the learned counsel for the defendant-in-error that the application here was not to have the judgment cancelled of record, but for an injunction. The answer to this suggestion is that in the notice of motion (see Record, p. 3, fol. 9) the court is asked to grant "such other and further relief as to the court may seem proper." If

the contention of the plaintiff-in-error is sound that he was relieved from his liability for the arrears of alimony by the discharge in bankruptcy, the court, it is submitted, had authority under this section to cancel and discharge the judgment of record *pro tanto*. Furthermore, it should be remembered that a judgment was actually docketed in this case, and under that judgment certain trust funds of the plaintiff-in-error were sequestrated (see Record, pp. 21-22, fols. 63-64).

It is true that it is stated by the learned counsel for the defendant-in-error, at page 2 of his supplemental brief, that this judgment has long since been satisfied, and in corroboration of his statement he refers to page 109-J of the record. But the record at page 109-J discloses nothing more than a statement to that effect contained in a brief of the learned counsel for the defendant-in-error, used by him in the Court of Appeals and submitted by him in opposition to the application of the plaintiff-in-error for leave to appeal to the Court of Appeals. Nowhere in the record does it appear that this judgment has ever been satisfied, and it is submitted that a statement by counsel by way of argument in a brief cannot be taken as a substitute for evidence. It appears from the record that this trust fund had been sequestrated and was still so held when the plaintiff-in-error applied for and was denied relief because of his discharge in bankruptcy.

Section 1268 of the Code has been declared by the Court of Appeals to be declaratory of the pre-existing practice; to be remedial in its nature; and to be a provision which should be liberally construed (see p. 3 of Reply Brief of plaintiff-in-error). It is to be noted that the cases referred to by the court in the opinion there quoted are cases where an injunction was applied for.

SECOND POINT.

The court had authority to grant relief on motion.

It is urged in the supplemental brief of the learned counsel for the defendant-in-error that no such authority exists in New York. This was the practice followed in

Moore v. Upton, 50 N. Y., 593,

and referred to at page 23 of the original brief of plaintiff-in-error. It was the practice referred to in the cases cited by the court in

West Philadelphia Bank v. Gerry, 106 N. Y., 467.

The learned counsel for the defendant-in-error relied on two cases as showing the want of power of the court to grant the relief prayed for by the plaintiff-in-error on motion. *Spears v. Matthews*, 66 *N. Y.*, 127, one of the cases cited by him, was a case in which the court held that it had no power on application of the plaintiff, to renew or continue a temporary or preliminary injunction pending an appeal after judgment had gone against him in the action. As the judgment determined that the plaintiff had no rights, it would be remarkable if the court had construed the provisions of the Code providing for temporary injunctions to extend to such a case.

The other case cited by him, *Jackson v. Bunnell*, 113 *N. Y.*, 216 involves the proposition that a plaintiff who has obtained a judgment cannot by a motion in the action in which he obtained the judg-

ment get supplemental relief. He either was or was not entitled to the injunction under the judgment obtained by him and the judgment is complete in itself. But it is a very different proposition to hold that a court is without power, when it finds that its judgment should no longer be enforced against a defendant, to prevent its enforcement on motion.

It is respectfully submitted that the Supreme Court of New York has authority without regard to the Code provisions, to issue a restraining order. As recognizing such authority, see in addition to the cases heretofore cited showing that the practice followed by the plaintiff-in-error is the practice in New York,

Woerishoffer v. North River Construction Co., 99 N. Y., 398.

THIRD POINT.

The position of the plaintiff-in-error would have been no better had he begun an independent action as suggested by the learned counsel for the defendant-in-error, than was his position on a motion made in the divorce proceeding.

The learned counsel for the defendant-in-error seems to contend that the plaintiff-in-error had no rights in court, for the reason that he proceeded by motion, and that having no rights in court on the motion, the court could, its favor being sought, refuse to hear him, notwithstanding he had never

been adjudged in contempt. Had the plaintiff proceeded by an original action to obtain the relief which he sought by motion, he would still have been in a Court of Equity. Being in a Court of Equity, if the relief sought by motion was addressed to favor, it is difficult to see how the filing of a complaint would have entitled him as of right. If the court could not have dismissed his complaint because of his seeming contempt without giving him a hearing had he filed a complaint, it is exceedingly difficult to see why, when he followed a practice permitted by the court and made a motion, he should be in any worse position before the court than if he had followed the practice suggested by the counsel for the defendant-in-error.

FOURTH POINT.

The denial of the motion involved the decision of a federal question, over which this court has jurisdiction.

A.

It is respectfully submitted that without regard to the sequestration proceedings, which will be referred to hereafter, the denial of the motion made by plaintiff necessarily involved a federal question.

The only question considered by the court, and the only question which it had a right to consider, as plaintiff-in-error contends (see Reply Brief of Plaintiff-in-error, pages 1-4) was the effect of the Bankrupt Law. If but for the fact that the court did not regard the liability as discharged by the discharge in bankruptcy, the motion would have

been granted, then the plaintiff-in-error was denied relief in consequence of the construction placed by the court upon a federal statute.

Would it be contended that if the plaintiff-in-error had sought by an independent proceeding the cancellation of this judgment or the stay of execution on the ground of his discharge in bankruptcy, that the defendant-in-error could not have removed the case into the Federal courts? If she could have, and on the motion made by the plaintiff-in-error in this case, no other question was presented than a Federal question, the decision of which led to the denial of the motion, it would seem that this court ought to have jurisdiction on writ of error.

It is respectfully submitted that this case should be governed by the rule laid down by Mr. Justice STRONG in

> Tennessee v. Davis, 100 U. S., 257, at 264:
>
> "The case consists of the rights of one party as well as the other, and may truly be said to arise under the constitution, or a law, or a treaty of the United States, whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted."

B.

The suggestion to which the above argument is urged as an answer, involved the idea that it was time enough for the plaintiff-in-error to urge his discharge in bankruptcy when, in consequence of

the action of the defendant-in-error, he was prejudiced. It is respectfully submitted that even from this point of view, the plaintiff-in-error is clearly entitled to have his case considered by this court. The record shows the following undisputed facts:

(1) A continuous fixed liability, not subject to modification or change, evidenced by the judgment of divorce.

(2) A docketed judgment for the specific sum of $4,500, based upon the judgment of divorce.

Record, page 82.

(3) *Proceedings of sequestration by the judgment creditor, resulting in a judgment directing "that the net income of a certain trust fund of $100,000* should be paid to deponent (plaintiff) from time to time *whenever and so long as the said William B. Wetmore should be in default in paying the said alimony and the said moneys awarded for the maintenance and education of the said three infant children."*

Record, pages 21-22, folios 63-65.

(4) *The only moneys ever received by plaintiff were payments by the New York Life Insurance and Trust Co. and Continental Trust Co.* under said judgment of sequestration.

Affidavit of Mrs. Markoe, pp. 21-22, folios 63-64.

To the same effect see affidavit of Mr. Candler, p. 30, folio 89.

(5) The moneys so received under said judgment from said trust companies were not sufficient to pay the said alimony and for maintenance and education of the children:

Affidavit of Mrs. Markoe, p. 22, folio 65.

(6) After crediting all moneys received from said two trust companies, there remains due for alimony and for maintenance and education of the children a large sum of money, exceeding the sum of $30,000.

Affidavit of Mrs. Markoe, p. 22, folio 66.

(7) The plaintiff-in-error states the amount due for alimony and for maintenance and education of the children to be the definite sum of $19,221.60 on the 13th of January, 1899, the date of adjudication in bankruptcy.

Page 5, folio 14; page 8, folio 23.

(8) Mr. Candler gives further particulars of the sequestration judgment, directing payment of income, in substance as follows: Owing to failure of defendant to comply with the provisions of the judgment of divorce, the plaintiff instituted a certain action against defendant and his mother as trustee of his father's will, which resulted in a judgment "*directing that the income from a certain trust fund referred to in the will of the said defendant's (William B. Wetmore's) father for his benefit, should be paid to the said plaintiff, whenever he, the said defendant, should be in default in mak-*

ing payments under the said judgment of divorce."

Page 30, folio 88.

As has been before stated (see Point I of this brief), it nowhere appears that the judgment docketed has ever been satisfied. The record leaves that matter entirely to speculation. It does appear affirmatively that this trust fund is held to secure to the defendant-in-error the arrears of alimony and allowance even in excess of the docketed judgment. It is conceded by the record that he is largely in arrears, and was at the time when he filed his petition in bankruptcy, and when he was adjudicated a bankrupt, and therefore it must be presumed that this trust fund secured in the sequestration proceedings was being applied at the time when plaintiff made this application for the discharge of those arrears.

C.

It has been urged by the learned counsel for the defendant-in-error that this court has refused to review an order denying a motion to quash an execution, and that therefore it cannot entertain jurisdiction to review an order denying an application such as was made by the plaintiff-in-error in this case. It is respectfully submitted that the conclusion does not follow from the pressure. It is true that this court has refused to review an order denying an application to quash an execution, but it has done so for apparently one of two reasons, or both: (1) That the application was refused by the court in the exercise of its discretion; (2) that the quashing of the execution could not be regarded as final, for the reason that another execu-

tion might issue. In the case at bar, had the application made by the plaintiff-in-error been granted, it would have been a final determination that the defendant-in-error was not entitled to collect of the plaintiff-in-error the arrears of alimony and allowance.

FIFTH POINT.

The judgment awarding alimony was a fixed liability.

It is only proposed to consider in this connection the question as to whether a sum of money decreed by a court to be paid annually or at stated times during the year can be said to be a judgment for a fixed amount within the meaning of the Bankrupt Law.

The suggestion has been made that it cannot be said to be a fixed liability, because the amount payable at any given time must be fixed by computation. Would it be seriously contended that the maker of a note, payable in installments, could not be discharged in bankruptcy as to installments past due because to ascertain the amount due one would have to enter into a computation? Would it be contended that a tenant under a written lease whereby the rent is payable monthly would not be discharged in bankruptcy as to the arrears of rent due because it would be necessary to make a computation in order to determine the amount due at the time of filing his petition? If the contention could not be made successfully in either of the cases supposed, it is difficult to see how the contention can be made as to the liability arising under a judgment. Section 63, so far as material to this question, reads as follows:

"Debts of the bankrupt may be proved and allowed against his estate which are

"1. *A fixed liability as evidenced by a judgment or an instrument in writing.*"

A fixed liability, under this provision of the Bankrupt Law, can be evidenced in one of two ways—either by a judgment, or an instrument in writing. And if a debt under an installment contract can be discharged in bankruptcy, it is submitted that a debt accruing by installments under a judgment is equally entitled to discharge. And there seems to be no good reason why both should not be held to be within the provision of the Bankrupt Law. That is certain in legal contemplation which can be rendered certain.

The suggestions presented by the learned counsel for the defendant-in-error in the fourth point of his supplemental brief show conclusively that the plaintiff-in-error would not be entitled to claim that the discharge in bankruptcy released him from liability as to alimony and allowance accruing after the filing of his petition. But the plaintiff-in-error conceded this, and therefore made his application entirely with reference to past obligations. The discussion of provability of the claim of the plaintiff-in-error in the bankruptcy proceedings and its discharge will be found in the original brief of the

plaintiff-in-error at page 7, and in the reply brief of plaintiff-in-error at pages 12-18.

Dated November 19, 1904.

Respectfully submitted,

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